

PUBLIC EXHIBITS AND TRANSCRIPTS - MATERIAL UNDER SEAL IN SEPARATE  
SUPPLEMENT

ORAL ARGUMENT NOT YET SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Case No. 02-1244

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Consolidated with Case Nos.  
02-1246, 02-1247, 02-1248 & 02-1249

BEETHOVEN.COM, *et al.*,

*Petitioners,*

v.

THE LIBRARIAN OF CONGRESS,

*Respondent.*

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On Petition to Review an Order of the Librarian of Congress

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EXHIBITS AND TRANSCRIPTS

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## Table of Contents

July 30, 2001 Hearing Transcript.....	JA-0547
July 31, 2001 Hearing Transcript (Sherman).....	JA-0551
July 31, 2001 Hearing Transcript (Rosen).....	JA-0561
August 16, 2001 Hearing Transcript (Fisher).....	JA-0562
August 17, 2001 Hearing Transcript (Wise).....	JA-0564
August 22, 2001 Hearing Transcript (Halyburton).....	JA-0566
August 24, 2001 Hearing Transcript (Donahoe).....	JA-0569
August 28, 2001 Hearing Transcript (Jaffe) .....	JA-0572
August 30, 2001 Hearing Transcript (Moore) .....	JA-0573
August 31, 2001 Hearing Transcript (Fisher).....	JA-0574
September 4, 2001 Hearing Transcript (Pearson).....	JA-0587
September 5, 2001 Hearing Transcript (Jeffrey) .....	JA-0588
September 6, 2001 Hearing Transcript (Davis) .....	JA-0592
September 10, 2001 Hearing Transcript (Marks) .....	JA-0598
RIAA Exhibit No. 150 DR (September 14, 2001).....	JA-0601.3
RIAA Exhibit No. 151 DR (September 14, 2001).....	JA-0601.5
RIAA Exhibit No. 152 DR (September 14, 2001).....	JA-0601.8
October 22, 2001 Hearing Transcript (McDermott).....	JA-0601.11
October 24, 2001 Hearing Transcript (Marks) .....	JA-0601.13

1 knowledge about those services and their circumstances  
2 would not be freely available to the broadcasters and  
3 webcasters.

4 Each agreement upon which the RIAA relies  
5 provides for a one-way confidentiality provision that  
6 allowed the RIAA to present the agreements as evidence  
7 in this CARP proceeding specifically, while silencing  
8 the licensee from having any communications with any  
9 third parties about the terms and conditions of their  
10 RIAA licenses.

11 The result was on April 11th, RIAA  
12 presented its direct case, relying on its agreements  
13 with the 25 licensees, claiming they constituted the  
14 best evidence of a generally applicable marketplace  
15 rate. RIAA in so doing presented testimony  
16 essentially from one person, Steven Marks, the RIAA's  
17 lead negotiator for the proposition that these 25  
18 agreements reflected a willing buyer, willing seller  
19 standard that is generally applicable to all the  
20 thousands of broadcasters and webcasters that filed  
21 notices to avail themselves of the statutory license.

22 Astonishingly, Mr. Marks in his testimony

1 speaks not only for the RIAA as to the willing  
2 seller's perspective, but he also purports to speak,  
3 albeit entirely on a hearsay basis, for various  
4 webcasters that entered into the RIAA licenses as to  
5 their perspectives and motivations.

6 This modus operandi of the RIAA is  
7 particularly disturbing in a proceeding like this  
8 where there is no subpoena power and no third party  
9 discovery. The RIAA essentially stacked the deck with  
10 a proposed willing buyer willing seller standard under  
11 circumstances where the Panel has been presented with  
12 testimony only from those on one side of that  
13 equation, the seller.

14 We had to make a motion to the Copyright  
15 Office seeking the RIAA to waive the confidentiality  
16 provisions I talked about, or in the alternative, to  
17 strike the prior voluntary licenses upon which RIAA  
18 relies just to be able to give those licensees a  
19 comfort level that they could speak with us without  
20 being in violation of their RIAA agreements.

21 We made the motion. The RIAA ultimately  
22 capitulated as to all except the one up there, which

1 as I said, they capitulated on today. But it has  
2 since balked about the manner in which we may provide  
3 assurances to the licensees that they are free to  
4 speak with us.

5 Imagine the following situation. People  
6 sign these agreements with confidentiality clauses  
7 that say they can't talk to anybody. That is what  
8 they know. We can't go talk to them. Make a motion.  
9 We finally get the ability to go talk to them. Then  
10 the RIAA says you can't show them the order saying  
11 that it is okay to talk to us. They made a motion to  
12 redact the order which we were going to give to the  
13 licensees so we could give them a comfort level it's  
14 okay to talk to us.

15 Worse than all of that is the confluence  
16 of all the circumstances. It took us until just a few  
17 weeks ago to get the resolution of the motion which  
18 would give us even the possibility of talking to these  
19 25 licensees.

20 Of course by then, the fact is that many  
21 of these licensees are defunct. Of course we have to  
22 overcome the reluctance of third parties to come

1 forward where there is no subpoena power to compel  
2 them.

3           The reality is that it is extremely  
4 difficult, and certainly impossible on our direct  
5 case, for us to present evidence specifically from  
6 these 25 licensees. That being said, we will be able  
7 to demonstrate to this panel that there are  
8 fundamental bases upon which to be skeptical about  
9 whether many or even all of the prior licenses upon  
10 which the RIAA seeks to rely were with "comparable"  
11 licensees who are under "comparable" circumstances.  
12 I will talk about this a little bit more in a few  
13 minutes.

14           One has to wonder though fundamentally if  
15 all these deals are truly reflective of a free willing  
16 buyer, willing seller marketplace, why has the RIAA  
17 gone to every length to prevent us and you from  
18 hearing from these licensees? If it is truly willing  
19 buyers, why did they go to all those lengths to shut  
20 them up?

21           Now moving past the troublesome efforts of  
22 the RIAA to silence the licensees, what do the 25

1 of a clearinghouse function where there is -- there  
2 are offers presented and the Harry Fox Agency might  
3 take those offers to the music publishers for  
4 consideration.

5 So it serves both as an agent with  
6 instructions in advance and as a clearinghouse for  
7 receiving offers and then getting approvals.

8 With respect to the reproduction right for  
9 sound recordings, it would include just what you would  
10 expect. It would include the same wax cylinders, I  
11 suppose, as well as vinyl discs, cassettes, CDs, and,  
12 again, computer files. Again, there are  
13 synchronization of the sound recording. It is the  
14 sound recording of Whitney Houston that is  
15 synchronized with the motion picture The Bodyguard.

16 And there is a new category of  
17 reproductions called digital phono record deliveries,  
18 which refer to a computer file that is made as the  
19 result of a digital transmission.

20 The bodies that license the sound  
21 recording reproduction right mostly are the individual  
22 record companies, because most reproductions are



1 separately licensed by individual companies. But  
2 Sound Exchange also has a role here with respect to  
3 the limited category of ephemeral recordings, which we  
4 will talk about under Section 112 of the copyright  
5 law.

6 Just to summarize, for musical works, the  
7 copyright owners are the songwriter and the publisher.  
8 The songwriter writes the music, gets into a business  
9 relationship with a music publisher who generally then  
10 owns the copyright. The bodies that license those  
11 works for performances are ASCAP, BMI, and SESAC, and  
12 for the reproduction right are the Harry Fox Agency  
13 and individual publishers.

14 For sound recordings, you have the artist,  
15 the producer, and all of the other people who are  
16 involved in the creation of the sound recording, and  
17 that would include everybody from the featured artist  
18 as well as the background musicians, the background  
19 vocalists, the record producer, the recording  
20 engineers, the people who mix the sounds -- a large  
21 group of people responsible for the creation of the  
22 recording itself, and then there's the record label,

1 so that in this case, for example, you would have  
2 Whitney Houston and all the other people involved in  
3 making the recording, and then Arista Records, which  
4 is the record label that would then own the copyright.

5 The licensing bodies for sound recordings  
6 include --

7 ARBITRATOR VON KANN: Can I stop you a  
8 minute?

9 THE WITNESS: I'm sorry. Sure.

10 ARBITRATOR VON KANN: With respect -- the  
11 mixing guy at some record company is a copyright  
12 owner?

13 THE WITNESS: Well, if you take a look  
14 especially at the legislative history of the creation  
15 of a copyright for sound recordings, you will see that  
16 the way that the music is put together is considered  
17 an important function in terms of the creative act  
18 and --

19 ARBITRATOR VON KANN: In other words, the  
20 word "mixer" isn't -- doesn't have a legal copyright  
21 in that product, does he? The record company for whom  
22 he works does.

1 THE WITNESS: It depends on the  
2 contractual relationship between Bill Smith and either  
3 the record company or the record producer or whoever  
4 Bill Smith is working for.

5 ARBITRATOR VON KANN: So he may.

6 THE WITNESS: He may, yes.

7 BY MR. GARRETT:

8 Q Mr. Sherman, you discuss on page 12 of  
9 your testimony, do you not, the different  
10 copyrightable contributions to a sound recording?

11 A Thank you for reminding me of that.

12 Q And is that the reference to the  
13 legislative history that appears there on page 21?

14 A Yes, the --

15 Q Footnote 21.

16 A Footnote 21 refers to the legislative  
17 history I was just describing.

18 And then, going back to the licensing  
19 function, the performance right with respect to the  
20 statutory component of the performance right, that  
21 would be licensed by Sound Exchange. Individual  
22 record companies would license the performance right

1 where they own an exclusive right that is outside the  
2 statutory license.

3 And reproduction rights, again, are  
4 generally licensed by individual record companies, but  
5 Sound Exchange would have this function with respect  
6 to ephemeral recordings.

7 Again, just to put this into context, who  
8 gets paid when a CD is played by a radio station? In  
9 the case of the musical work, that money would be  
10 collected for the songwriter and the music publisher  
11 by ASCAP, BMI, or SESAC, the performing rights  
12 organizations. But for the sound recording, for the  
13 artist and the record label, nobody is paid because  
14 the right does not extend to performances by radio  
15 stations.

16 Who gets paid when a record store sells a  
17 CD? In the case of the musical work, the money is  
18 collected for the songwriter and the music publisher  
19 from the record company, generally by the Harry Fox  
20 Agency. The sound recording -- the record company  
21 gets its money and those royalties are shared with the  
22 recording artists.

1                   And then, a final example, in the case of  
2       webcasts, when a CD is played by a webcaster, again,  
3       ASCAP, BMI, or SESAC collect the payments for the  
4       songwriter and the music publisher for the musical  
5       work, and Sound Exchange collects the royalties for  
6       the artists and record companies for the sound  
7       recording.

8               Q       Mr. Sherman, you had also referred earlier  
9       to the Sound Exchange as having a non-exclusive  
10      license. Could you just explain what you meant by a  
11      non-exclusive license? Who else can license?

12              A       Individual record companies have the right  
13      at all times to license everything related to a  
14      performance or related to any of their copyright  
15      rights to any party. So that means that an individual  
16      record company could do a deal with a webcaster that  
17      would cover webcasting, that would be covered by this  
18      statutory license, could cover webcasting that is not  
19      covered by this statutory license, or both.

20                   So there is an entire -- there is the  
21      possibility of direct licensing at all times, where an  
22      individual webcaster can go to an individual record

1 company and seek the rights that otherwise might have  
2 been negotiated by Sound Exchange.

3 ARBITRATOR VON KANN: Mr. Sherman, can you  
4 flip back one slide, who gets paid, the broadcast  
5 example? I have one question about that.

6 THE WITNESS: Yes.

7 ARBITRATOR VON KANN: We have been told in  
8 various ways that the reason that it says "no one"  
9 under Sound Recordings is that Congress apparently  
10 concluded that playing records on the radio promoted  
11 their sale, and that was, in effect, enough  
12 compensation for you and you didn't need a royalty  
13 payment on top of that.

14 Do you have -- can you help me understand  
15 why that same rationale doesn't apply to the owners of  
16 the musical work who also get additional compensation  
17 if there are more sales? If playing the record on the  
18 radio promotes more sales, then on your next flip  
19 chart both sides -- the musical work owner and the  
20 recorder -- get paid.

21 But with respect to this one, the  
22 broadcast example, one side does and one side doesn't.

1 And I'm trying to understand, to the extent you can,  
2 why Congress saw that as a different situation,  
3 because it would seem the rationale would be equally  
4 applicable to the musical work copyright owners as  
5 well.

6 THE WITNESS: I think actually your  
7 question illustrates that it isn't true that it was  
8 the promotional value that led Congress not to create  
9 a right for sound recording owners. What we have here  
10 is a historical anomaly.

11 Musical works had a copyright almost since  
12 the beginning of copyright law, and the rights were  
13 gradually extended with mechanical reproductions, and  
14 so on, but sound recordings came much later after the  
15 most important revision of the copyright law which was  
16 in 1909.

17 As a result, you had radio stations begin  
18 to use sound recordings as their primary programming  
19 material before sound recordings had any copyright  
20 protection. Once that happened, broadcasters did not  
21 want to have to pay additional royalties to the  
22 artists and record labels who produced the sound

1 recordings. And, therefore, they vehemently blocked  
2 any legislation that would extend the right to sound  
3 recordings.

4           And the truth is they have the political  
5 wherewithal to do that. If you think about it, every  
6 Congressman has maybe five or more radio stations in  
7 its district. How many Congressmen have record  
8 companies in their districts? So try as we might, or  
9 as the artist might, there was no way to overcome the  
10 broadcaster's political opposition to the creation of  
11 a sound recording.

12           We made the argument that you just alluded  
13 to, that the same promotional benefit applies to the  
14 musical works, and that's true of all copyright, in  
15 fact. When you have a book that's made into a motion  
16 picture, book sales skyrocket. But that doesn't mean  
17 that you give away the book rights to the motion  
18 picture studio. In fact, they negotiate and pay a  
19 pretty sum for that opportunity.

20           So the promotional argument was basically  
21 something that was used as a justification for  
22 grandfathering radio stations when the Digital



1 Performance Rights Act was created in 1995. We  
2 understood politically the need to grandfather radio  
3 stations, not just for their analog but for their  
4 digital broadcasts as well.

5 It was a political compromise, and the  
6 legislative history reflects the symbiotic  
7 relationship as a means of justifying the distinction  
8 between radio versus the new ground rules that were  
9 now going to be created for new digital transmissions.

10 ARBITRATOR VON KANN: Thank you.

11 THE WITNESS: There are a number of  
12 limitations on copyright, and I discuss those  
13 beginning on page 14 of the written statement. And  
14 they are detailed there, but it probably isn't  
15 necessary to go through each of them. I think the  
16 important point is that there are different exemptions  
17 for musical works than for sound recordings because of  
18 the different way these copyrights arose and were  
19 treated under the copyright law.

20 One exemption that I want to mention in  
21 particular is digital transmissions of sound  
22 recordings to business establishments. This is the

1 who the players are?

2           A       I think -- if we're all honest here, there  
3 are three major players in the webcastic area. It's  
4 AOL, Viacom and Yahoo. They have the most traffic.  
5 They have the most services and they're the biggest  
6 companies. And I think that it came up in the context  
7 of my involvement in the Yahoo deal and my desire  
8 really to avoid arbitration and it was my perception  
9 and perhaps my incorrect perception that if we worked  
10 hard to get at least one of those deals closed, that  
11 the others would follow and therefore we could avoid  
12 an arbitration.

13                   I learned though that the webcasters -- so  
14 what had happened was Congress gave us an antitrust  
15 exemption in negotiation and gave the webcasters an  
16 antitrust exemption to negotiate. They have a trade  
17 association called DMA, the Digital Media Association.  
18 I think that's what it stands for.

19                   It became apparent that not all of DMA's  
20 members had the same view about this so we could no  
21 longer negotiate with the trade association. We were  
22 there for dealing with the individual companies. At

1 so that all of those several hundred webcasters may  
2 remain in business?

3 A No. So you want further information on  
4 this issue.

5 ARBITRATOR VON KANN: He may or may not.

6 (Laughter.)

7 BY MR. GARRETT:

8 Q No, go ahead.

9 A I think your question rightfully  
10 highlights a difficulty that if one is not to have a  
11 all or nothing polar position that all webcasters must  
12 be allowed to survive, which I think is the  
13 unacceptably extreme reading of the statute, how do  
14 you decide how the statutory criterion should  
15 incorporate this concern for the infant character of  
16 the industry? And my suggestion on that front is,  
17 once again, to recur to the underlying statutory  
18 purpose of encouraging the development and deployment  
19 of these technologies.

20 So, for example, setting a rate at a level  
21 that would drive a substantial proportion of the  
22 webcasters out of business would be unacceptably high.

1     Why would it be unacceptably high?  Because Congress'  
2     aspiration here was to stimulate the development of  
3     this field, and one can surmise, although there is not  
4     explicit legislative history on this precise point,  
5     that Congress contemplated an experimental, sort of,  
6     Brandeisian image of the development of this industry,  
7     not rapid consolidation into a few webcasters.  And so  
8     the underlying statutory purpose of encouraging the  
9     development of this field should, in my view, be the  
10    beacon when determining how concern with the infant  
11    character of the industry should be brought to bear in  
12    the willing buyer/willing seller criteria.

13           Q     It's fair to say, it is not, that  
14    regardless of what this Panel does that there will be  
15    a certain number of webcasters who over the upcoming  
16    years are going to go out of business?

17           A     Yes.

18           Q     And indeed there have been webcasters who  
19    have gone out of business without paying a dime in  
20    royalties, correct?

21           A     That's my impression.  I have no personal  
22    knowledge of that, but that's my impression.

1           THE WITNESS: No, that is not considered  
2   to be the critical mass necessary to attract  
3   advertisers at this point in time. Our estimations  
4   are that once we can reach 10 million hours, 5 million  
5   uniques that we would have that critical mass and be  
6   able to attract advertisers.

7           The one thing I think that everyone needs  
8   to understand about the advertising situation right  
9   now is that advertising was ramping up nicely on the  
10  Internet. It was being funded by many of the .com  
11  companies. As those companies began to struggle over  
12  the last 12 to 18 months a lot of that advertising has  
13  dried up or just truly gone away.

14          Now what you have are traditional  
15  companies looking at the Internet as an opportunity to  
16  expand their brand and create awareness for their  
17  products and services. They are new to the space and  
18  they are just testing. They're still learning about  
19  it, they're still trying to understand the measurement  
20  aspect of advertising in the space. It's going to  
21  take some time for that to build.

22          And even the largest Internet players out

1     there today, they're struggling tremendously with  
2     their advertising revenue, as well as other  
3     traditional media arenas.

4             So, until the economy and advertising in  
5     general turns around, it's not going to impact this  
6     area positively.

7             CHAIRMAN VAN LOON: Did I understand you  
8     to say that in your 4 million plus listener hours in  
9     March that that reflected 5 million uniques?

10            THE WITNESS: No. Two million uniques for  
11     that month, yes.

12            CHAIRMAN VAN LOON: Okay.

13            ARBITRATOR GULIN: And those 2 million  
14     uniques are, of course, for all 100 channels that you  
15     have?

16            THE WITNESS: That's correct.

17            ARBITRATOR GULIN: So when you run an ad,  
18     the same ad is seen on every channel?

19            THE WITNESS: No, it is not. We currently  
20     use an insertion technology provided by a third party  
21     so that we're able to target by demographics. So if  
22     we have an advertiser that wants to reach males 24 to

1 open question.

2 ARBITRATOR VON KANN: If a listener or  
3 somebody who comes into the website and is listening  
4 to this thing in Philadelphia, they probably don't  
5 have too much interest in the 80 percent of the ads  
6 that talk about going to the Home Depot in San  
7 Francisco.

8 THE WITNESS: I would agree. The interest  
9 is mostly from our local listeners that are in the  
10 local area. There are some -- I suppose there are  
11 some novelty for that out of town listening, but it's  
12 really focused on local

13 BY MR. JACOBY:

14 Q Following up Judge Von Kann's question,  
15 who is your targeted audience for the internet?

16 A Our local audience where the Arbitron  
17 diaries go out because that is truly our core business  
18 and that's where we've proven we can make money.

19 One of the other features of that player  
20 will take you to this page, kind of digs you deeper  
21 into that experience where you can click on a  
22 biography of information. We'll show you these slides

1 it along with the audio and then send it out.

2 Questions on that? It's magic.

3 BY MR. JACOBY:

4 Q Okay, we can turn this off. Mr.

5 Halyburton, you indicated that your target audience  
6 for streaming activity is the same target audience you  
7 have for the radio, the over-the-air product?

8 A Right.

9 Q What, in fact, do you know about the  
10 audience you're reaching with your internet product?

11 A Well, the information we have about who  
12 we're reaching is fairly limited if you compare it to  
13 the kind of information that we tend to know about our  
14 audiences from the Arbitron that provides a great deal  
15 of data about those people that listen to all the  
16 radio stations in a market and so on.

17 We have some indications that a lot of the  
18 activity and this comes from Yahoo, tends to happen  
19 over the middle of the day. It seems to be the work  
20 hour kind of the 9 a.m., to 4-ish.

21 Q Let me just, I guess, ask you to turn to  
22 Exhibit 4 which I think is what you're referring to.



1                    Could you explain what --

2            A        This lists our total daily connections for  
3        each of our stations in the markets. KFOG is your  
4        first column there. I think that illustrates the  
5        point well. We can certainly look through some of the  
6        other ones. But the pattern seems to really the same  
7        across all those stations. Somewhere around the 9  
8        o'clock our, the 8 o'clock hour when people start to  
9        arrive at work, this is the supposition that we're  
10       making that you start to see the numbers increase. It  
11       increases kind of across that work day period and then  
12       starts to fall off when people prepare to go home.

13            Q        How does that compare, if you were to look  
14        at the data that's accumulated by Arbitron, I guess,  
15        in terms of your over-the-air listenership. What  
16        would the curve, if you will, look like as compared to  
17        the curve that one could draw from point to point on  
18        the Exhibit 4?

19            A        It would look quite a bit different. If  
20        this was 6 a.m. in the morning and this is 6 p.m. at  
21        night, it would start growing here before the 6 a.m.  
22        hour. It peaks about 7 a.m. This is not to scale, so

1 Corporation a little bit for the panel. You've  
2 mentioned a number of radio stations. How does that  
3 compare in the big scheme of things?

4 A The core business of Clear Channel, the  
5 company was founded as a radio over-the-air broadcast  
6 company. We have 1,180 -- 1,190 radio stations right  
7 now. That makes up about 11 percent of the 10 to  
8 11,000 commercial radio stations licensed in the  
9 United States.

10 In addition to that core business we have  
11 some ancillary business. We have foreign broadcast  
12 operations which are radio. We have an outdoor  
13 company. We have a live entertainment company. We  
14 have this very minor Internet initiative. And I think  
15 that pretty much covers it.

16 Q All right. Now, for purposes of your  
17 testimony, can we agree that when you talk about Clear  
18 Channel's broadcasting operations, we're talking about  
19 within the United States, right?

20 A Right. I think we're going to  
21 limit -- and certainly my area of expertise is 1,180  
22 domestic radio stations.

1 compelling for people that would come to the websites.

2 Q Now when you say that "we" are doing that,  
3 who's the "we" in that sentence?

4 A It's Clear Channel.

5 Q At the corporate level is making this  
6 available to the stations.

7 A Correct, correct.

8 Q Now, looking back to the time when Clear  
9 Channel was simulcasting over the Internet, why was  
10 Clear Channel doing that? Or why were some Clear  
11 Channel stations doing that, might be a better  
12 question.

13 A And when we go back and we look at a  
14 roster of stations who were streaming in that, we  
15 asked the same question of ourselves, is, why are some  
16 doing it, why are some not doing it.

17 I think -- first of all, I've got to  
18 explain that this was a very grassroots effort, if you  
19 will, something that was more the initiative of the  
20 local stations rather than a corporate dictate. But  
21 I think, number one, it was just neat to be on the  
22 Internet, if you will. I mean, you get a little more

1 coverage and so on and so forth. It did extend our  
2 coverage beyond what was our traditional coverage map  
3 area. '98-99, where most of this stuff blossomed, we  
4 were, like everybody else, I think pretty enthralled  
5 with the Internet; not sure where the opportunities  
6 lay and probably didn't want to be left out of  
7 whatever that potential may be, and got on it for that  
8 reason. I think that's pretty much the reason for  
9 getting involved in it.

10 Q Are there any public interest  
11 considerations that affected that event?

12 A There is that element. We ar -- we do  
13 have federally-granted licenses. We do have a company  
14 philosophy that is a commitment to public service and  
15 giving back to the community. And I think that was a  
16 part of it. It possibly extended the availability of  
17 the station and some varying viewpoints.

18 We've got a station over in Hawaii that  
19 does Hawaiian music. It's not a format you're going  
20 to hear in too many other areas of the country. And  
21 there is a public service granted by Internet music.

22 Q Now, in general terms first -- and we're

1 individually, could exercise market power. That is a  
2 small enough number that there might be some concern,  
3 but I have not analyzed that.

4 In my view, the market power that I've  
5 been talking about here is the market power that  
6 results when you have a single agent who is legally  
7 authorized and given antitrust immunity to negotiate  
8 on behalf of the multiple owners of the rights.

9 Q I take it, then, that you don't view sound  
10 recordings as being owned by so many different people  
11 that it would be infeasible for a webcaster to make  
12 individual deals with major record companies, do you?

13 A Well, I don't think I ever used the word  
14 "infeasible." So, no, I don't think it's infeasible.

15 Q Well, you said it would be inefficient.  
16 Do you think it would be inefficient necessarily for  
17 a webcaster to deal with five different record  
18 companies?

19 A It could be, yes.

20 Q Are you aware that some webcasters have  
21 chosen to deal with more than five different suppliers  
22 of bandwidth?

1 originally developed. That is a service that we are  
2 contemplating, but have not yet launched.

3 Q Now in terms of the way that you structure  
4 your business arrangements with your current clients,  
5 have you had to make changes in those arrangements?

6 A We have. As all of you probably know, the  
7 advertising on the Internet market has changed rather  
8 dramatically over the last nine months. What we found  
9 is that the service is not generating enough revenue  
10 through the initial, the models, the revenue-share  
11 models that we had initially contemplated, were  
12 initially structured actually with our clients. We  
13 are having to consume more cash than our investors are  
14 willing to support in order to pay the bandwidth costs  
15 and reserve for the royalties and be able to continue  
16 to have a viable business going forward in this  
17 current environment.

18 So what we have done is gone back to a  
19 number of our clients and look to adjust the structure  
20 of our agreements with them, and ensure that there is  
21 a fee component of the service where each of our  
22 clients is guaranteeing us a fee, essentially on a per

1 be credible if you're news or talk.

2 Q And do you target content such as news and  
3 weather and so on to the local audience?

4 A Sure. There's so many sources for news.  
5 All our research says that what people want to know is  
6 what affects their life locally. What's the weather  
7 going to be, how did my sports team do, what's my  
8 kid's lunch menu today? What's going on in my  
9 community? Obviously, we will provide national news,  
10 but the key thing is the local news element and the  
11 local involvement in the community.

12 Q Can you describe the role that Entercom's  
13 radio stations play in developing and enhancing  
14 music-oriented programming?

15 A Well, again, it varies by format. Let's  
16 go to -- let's call it the rock formats or the more  
17 contemporary formats. That gets very involved.  
18 Sponsoring concerts, featuring artists, have artists  
19 come through the studio for live interviews, creating  
20 an image that this radio station is the place to be.  
21 We talk about in terms of water cooler. We want  
22 people talking about our radio stations the next day.

1 It might be controversial. It might be exciting. It  
2 might be exclusive. We're the first one to play the  
3 new Madonna album or something. So it's packaging all  
4 that. It's an intangible. It's the entertainment  
5 aspect of our business that we all get excited about.

6 Q And do program directors develop their own  
7 play lists?

8 A Play lists are developed locally. Local  
9 taste, whether there are some national trends within  
10 format, local tastes are different. An artist might  
11 be more popular in Boston than they might be in  
12 Sacramento, within the adult contemporary rock world.  
13 But yes, we have program directors and music directors  
14 at our stations who handle that.

15 Q Can you describe Entercom's primary  
16 sources of revenue?

17 A Advertising, period. We're an ad-  
18 supported business. We give our product away for  
19 free.

20 Q How do radio stations sell advertising?

21 A As aggressively as they can. We talked  
22 in-depth about demographics, I think, at the opening



1 of this session. Different formats appeal to  
2 different demographics or different income stratas,  
3 different areas of a listening base. Each of those  
4 have appeals to different advertisers. We have local  
5 sales forces. We have approximately 600 account  
6 executives within Entercom across our 18 markets that  
7 sell to local businesses, whether it's a tatoo parlor  
8 for an alternative station or a restaurant or movie  
9 theater or department store, or auto is a big  
10 category. So again, it's finding -- our job is to  
11 aggregate an audience that has enough of appeal to  
12 advertisers to make it a commercially viable business.

13 Q And are station revenues split between  
14 local and national ad sales?

15 A Yes. Local and national can be a little  
16 confusing in that as we talk about local, national, if  
17 you talk to advertisers, we define local as what our  
18 account representatives sell; we define national as  
19 what our national rep. firms sell and maybe it's worth  
20 a minute on what a national rep. firm is.

21 Let's take Boston as an example. We have  
22 probably 65 sellers there. They're not --

1 continued to see other streaming companies fail for  
2 whatever reason. And we mutually negotiated the \$395  
3 fee. So our view was we were keeping a vendor in the  
4 business of doing that. Their view was that \$395 was  
5 necessary to keep them afloat. I think even that  
6 business model is still under question from Stream  
7 Audio's point of view.

8 Q Can you estimate the proportion of  
9 streaming audiences that Entercom has as a fraction of  
10 your total over-the-air audiences, perhaps give the  
11 Panel some idea of the orders of magnitude?

12 A Sure. The metrics for web hits and  
13 streaming are still developing, so let's start with  
14 that as a basis. But back at the time the testimony  
15 in April, we did work to pull together some statistics  
16 to help answer those questions. To give some rough  
17 idea in Boston, WEEI which is and here's a commercial,  
18 the nation's leading sports dot station, end of  
19 commercial, has a website and sports fans are very  
20 active and involved and interested, would have -- WEEI  
21 would reach approximately 350,000 in a given week,  
22 about 35,000 to 38,000 of those would choose to use

1 the website and of those about 5,000 people would  
2 choose to use the stream. So I think that's a rough  
3 order of magnitude and that would be one of our more  
4 successful sites.

5 CHAIRMAN VAN LOON: Those numbers were  
6 350,000 listen?

7 THE WITNESS: Three hundred fifty thousand  
8 people over the age of 12 would listen to the station  
9 in a given week, the week we sampled. And 38,000  
10 visited the station's website and approximately 5,000  
11 people during that week chose to listen to the stream.  
12 So 5,000 of the 350,000 would be the rough balance.

13 BY MS. SCHAEFFER:

14 Q And WEEI would be one of your more  
15 successful streaming websites, radio stations?

16 A Correct.

17 Q So it's obvious from your previous  
18 statistic that there are some people who visit  
19 Entercom's streaming websites and don't actually  
20 stream?

21 A Some people who visit our station's  
22 websites and don't use the stream, that's correct.

1 commitments. I think we've already covered that.

2 Q Do these cost categories include all of  
3 your website development costs as a platform?

4 A No, they don't. In addition to that, we  
5 pay vendors to develop and maintain and host our  
6 websites. This goes back to the core of what we do.  
7 So that's not included there.

8 Q Turning to the revenue side, on page 12 of  
9 your testimony you state that to date streaming has  
10 delivered no discernible revenues to Entercom. Is  
11 that correct?

12 A I think I can clarify it now has delivered  
13 no revenues.

14 Q Right.

15 (Laughter.)

16 CHAIRMAN VAN LOON: Delete discernible,  
17 huh?

18 ARBITRATOR GULIN: Let me ask you about  
19 that, Mr. Fisher. Thirty-four stations are now being  
20 streamed through Stream Audio?

21 THE WITNESS: Correct.

22 ARBITRATOR GULIN: Your relationship with

1       them is I assume that you share a revenue if there  
2       were such a revenue?

3               THE WITNESS:   That's correct?

4               ARBITRATOR GULIN:   And this \$400 a month  
5       approximately that you pay is in the nature of a  
6       minimum fee towards that?

7               THE WITNESS:   Correct.

8               ARBITRATOR GULIN:   And now there are no  
9       advertisements that are being simulcast because of the  
10      problems with AFTRA.   So the ads that are on the radio  
11      station are now not coming through on the stream?

12              THE WITNESS:   Just to clarify.

13              ARBITRATOR GULIN:   Okay.

14              THE WITNESS:   Many of the ads are.   Only  
15      the ads that were required to block on some stations  
16      and in other stations because it was so cumbersome to  
17      pick out one ad out of the many that we carry during  
18      the day, we would just block all ads.

19              ARBITRATOR GULIN:   Okay.   So when those  
20      stations, for example, you're blocking all ads.   I'm  
21      trying to understand what you perceive as the benefit  
22      here.   If you're getting no revenues, you're paying a

1 minimum fee. Your ads from radio are not coming  
2 through. What is the purpose of doing this from your  
3 perspective?

4 And let me add to that, when the ads were  
5 coming through, you said you were not getting any  
6 additional revenues from the advertisers that were  
7 advertising on radio, even knowing that they were also  
8 being simulcast on the internet?

9 THE WITNESS: I think it goes back to a  
10 couple of things. One, it's what we do. We love  
11 audio. We love our stations. So if we can put them  
12 on there at some minimal expense, why not? At some  
13 point that might get rethought, just as the  
14 introduction of the \$400 fee when Stream Audio put it  
15 in. Some decided, you know what, it's just kind not  
16 worth it. And you'll notice not all our stations do  
17 stream because at some point they have to make a  
18 decision, do I put my resources there versus hire  
19 another person or buy more TV advertising in other  
20 words.

21 Your question is a great question. I  
22 think we're all adapting to a rapidly changing world.

1 I think what we all thought might happen two years ago  
2 when we said let's fund \$37 million to LMIV and when  
3 Stream Audio came to us and said we'll stream you for  
4 free, all those assumptions now are being challenged  
5 in the real world, so your point is why do we continue  
6 to do it? I don't know how long we would do it under  
7 steady state environment. It's not material to our  
8 business. Our business is really over-the-air  
9 broadcasting. But at the same time if we can learn  
10 something, if we can find other ways and I do say in  
11 here that I would hope at some point in the future it  
12 does become a business. I don't see that on the short  
13 term, but I would hope in the future it would.

14 Did that answer your question of if it's  
15 not a business, why are you doing it?

16 (Laughter.)

17 I think the best answer would be this  
18 thing is rapidly changing and devolving, not evolving  
19 would be my summary on it.

20 BY MS. SCHAEFFER:

21 Q Just to clarify for the record, I think  
22 you state in your written testimony at paragraph 42

1 that Entercom's total reported internet-related  
2 revenues in 2000 were approximately \$200,000.  
3 Correct?

4 A That's correct.

5 Q And again, none of those revenues were  
6 from streaming?

7 A None from streaming.

8 Q And when you state at paragraph 42 again  
9 that Entercom has targeted internet revenues of \$2  
10 million in 2001, do you expect that any of those  
11 revenues this year will come from streaming?

12 A None will come from streaming.

13 Q And how have you been going on that target  
14 of \$2 million this year?

15 A Well, as I also said at that time in  
16 April, it's unlikely we'd meet this target. We had to  
17 take a rough and I'd call it a SWAG -- stupid, wild  
18 ass guess.

19 (Laughter.)

20 In the financial community that's a gap  
21 term, when we arrived at the \$2 million. We've done  
22 \$262,000 through the first half of the year. We have



1 had some other sales that would lead me to believe  
2 that we'd be probably in the range of \$700,000 for the  
3 year. None from streaming. Mostly from people who  
4 want to buy links on our site. Sometimes we'll go to  
5 advertisers and do a contest, a fast food chain, where  
6 we're promoting a fast food chain and heck, you can go  
7 to our website and play a little contest and print a  
8 little coupon. Those are some of the exciting things  
9 we're playing around with.

10 ARBITRATOR VON KANN: Do you want to  
11 slightly upgrade the pretentiousness of the SWAG, you  
12 can describe it as one witness did to me as a  
13 strategic wild ass guess.

14 THE WITNESS: I'll write that down. When  
15 I said "stupid", that's because someone else made the

16 -- BY MS. SCHAEFFER:

17 Q Mr. Fisher, you described just before that  
18 streaming in your view does offer potential revenue  
19 opportunities.

20 Could you briefly describe what those  
21 opportunities might be?

22 A One, people are selling gateway ads.

1 dilemma and the difficulties of doing that in stream.  
2 So having started with that assumption, I then back  
3 into understanding the methodology that Dr. Jaffe's  
4 gone through of saying let's at least index it to  
5 something that has been derived through a body of,  
6 through a history of time and through negotiations  
7 over a period of time and that's for the ASCAP, BMI  
8 SESAC fees and then breaking that down. It does have  
9 a minimum on there that I might rather see lower, but  
10 I guess in the spirit of trying to reach an agreement  
11 it's something that I think I have indicated that I  
12 think I can live with. Does that answer your  
13 question?

14 BY MS. SCHAEFFER:

15 Q Do you see any difficulties or problems  
16 working out what revenue a percentage of revenue model  
17 might have in the context of websites and streaming?

18 A Well, I go back to my own belief here that  
19 our websites exist for a purpose much beyond the  
20 streaming. And I've talked about that and I think the  
21 statistics show that of the people who visit the  
22 website. I do acknowledge that people want to use the

1 streams. At the same time, I acknowledge that they  
2 can listen to our radio station by turning it on. So  
3 for the techno-savvy people and we're still talking  
4 about the earlier adopters here, what I want them to  
5 go to the website for is all the other stuff that I  
6 can't do over the air, so merely retransmitting what  
7 I'm doing over the air, over the internet to me is not  
8 a separate business. It's just an extension of what  
9 I'm already doing.

10 I forgot your question.

11 Q I think you largely answered it, but the  
12 question was do you foresee difficulties in separating  
13 revenues in a percentage of revenue approach as  
14 applied to the internet?

15 A No, I don't. I think the dilemma that the  
16 opposing side would have is the realization that there  
17 are minimal revenues out there at this time. It's  
18 still a developing business and I would hate to see it  
19 quashed in its early stage. We don't have to stream.

20 There are a lot of economics that have to  
21 factor into it, these fees being one of them.

22 ARBITRATOR VON KANN: Are the royalty

1 larger audience than anyone site by itself offers.

2 That economic model was showing pretty  
3 high promise, actually through the fall of last year  
4 and about January of this year for reasons I'd be  
5 happy to go into more if you're interested, the  
6 advertising market went through a very rapid and  
7 severe recession in our category.

8 We before that time felt these winds of  
9 change coming and began working with many of our  
10 customers to try to shift the economics to more and  
11 more a fee based relationship than an advertising  
12 revenue base relationship, but right now we are still  
13 heavily focused on ad revenues and that has been a  
14 disappointing source of income for us.

15 We are also right now, as I think the  
16 testimony indicates, we have been working on serving  
17 other kinds of customers beyond those in the wired  
18 internet particularly phone companies, wireless phone  
19 companies. We find this a very interesting long-term  
20 prospect for ourselves. In the U.S. particularly, the  
21 reality of that being a meaningful economic business  
22 is probably 2 to 4 years away, but it's still one in

JA-0587

1           A       Like many other media companies, we've  
2       been -- it's been very difficult to sell advertising  
3       in the current climate. It's particularly difficult  
4       to sell internet audio advertising, because we're  
5       trying to sell it to radio buyers who have Clear  
6       Channel, Infinity, the others knocking on their door,  
7       and have undersold their inventory during these same  
8       periods, and we're trying to convert them to a new  
9       medium which is similar to radio.

10          Q       And have you recently sought to supplement  
11       your ad sales revenues with charges to users?

12          A       We have. We've added a broadcaster  
13       subscription model and initial setup fee for the basic  
14       broadcaster. We charge \$14.95 for a new broadcaster  
15       to set up a stream, and approximately \$5 per month in  
16       recurring charges for the maintaining of that stream.

17          Q       And just to be clear, these are setup and  
18       technology charges to the broadcaster. These are not  
19       subscription charges to the listener, correct?

20          A       Right. It's free to listen to any of the  
21       streams on our site. We don't even require  
22       registration.

1 very difficult to demonstrate to a potential investor  
2 if they don't know whether the -- we'll go into this  
3 later I'm sure. But there's a 40 times difference in  
4 what the two sides of this discussion are asking for.  
5 And that's a very big difference to our potential  
6 investors in whether they should put money into our  
7 company and whether we'll be a viable business.

8 Q The suggestion has been made that there's  
9 really no cross because you could "free ride" in terms  
10 of awaiting the outcome of this proceeding and not  
11 incurring any litigation costs along the way with  
12 respect to the CARP outcome.

13 How do you react to that?

14 A As I think we've talked about throughout  
15 the presentation, our model is significantly different  
16 than everyone else that's coming before this panel.  
17 Because of that we've literally been afraid that we  
18 would be the odd man out, and that our model might be  
19 given up in order to achieve a settlement of the  
20 larger discussion.

21 So we've actively engaged Ken Kaufman,  
22 Greenberg Troutman, other lawyers, to participate and

1 make sure that our positions were making it through.  
2 And so maybe it's the wrong phrase, but Ken has our  
3 interest in mind, but he's also representing a lot of  
4 other parties. So we have lawyers watching our  
5 lawyers.

6 CHAIRMAN VAN LOON: He's right over your  
7 shoulder, Mr. Steinthal. I've been using that since  
8 I was a little kid.

9 BY MR. STEINTHAL:

10 Q Between the concerns you mentioned about  
11 the costs associated with litigation that led you to  
12 seek to negotiate with the RIAA and the concerns about  
13 uncertainty in relation to the investment community,  
14 given those concerns that led you to seek to  
15 negotiate, why is it that you're still here and not in  
16 the category of one of those 25 or 26 licensees that  
17 did reach agreement with the RIAA?

18 A Well, because the only offer we've  
19 received is -- well, we've not -- we don't believe  
20 that that's a fair number that's been put on the table  
21 that would allow us to not be here and participate in  
22 this. And we believe that this CARP is critical

JA-0590

1 toward reaching a fair determination of what the  
2 royalty rates should be.

3 Q You're familiar with the ask of the RIAA  
4 of the choice, if you will, between four-tenths of a  
5 cent per performance and the greater of 15 percent of  
6 revenue or 5 percent of operating costs?

7 A Correct.

8 Q What is your view as to the effect of the  
9 RIAA position on your ability to operate a meaningful  
10 business or seek funding if you had to operate under  
11 the RIAA's offer?

12 A By all accounts, the number that the RIAA  
13 is asking for in this CARP creates a scenario where we  
14 would not be a viable business. And we have serious  
15 concerns about whether -- or a going concern, if that  
16 rate were to be determined to be the right rate.

17 MR. STEINTHAL: I have on further  
18 questions.

19 CHAIRMAN VAN LOON: Mr. Katz, will you be  
20 doing the cross?

21 MR. KATZ: I will.

22 CHAIRMAN VAN LOON: Okay.

JA-0591

8216



1           A       Well, WMCA is one of our largest radio  
2       stations. It serves New York City. And for nearly  
3       two years it streamed its entire content. Came to  
4       budgeting time last October, and One Place, our own  
5       company who had been trading this service to us in  
6       exchange for spot announcements, all of a sudden said,  
7       "We're going to charge you \$1,500 for the bandwidth to  
8       stream your radio station." What's that? \$18,000 a  
9       year I think. I don't have a calculator, but I think  
10      that's what it is.

11                 We looked at it. We looked at a listing  
12      of the hits and where they were coming from, and we  
13      said, "You know, that \$18,000 a year could probably be  
14      better spent." We could buy billboard. We could, you  
15      know, get some taxicab backs. Or maybe we could hire  
16      a part-time person or something to do some direct mail  
17      or something like that.

18                 But a decision was made that \$18,000 just  
19      was too much money in terms of the benefit, the ears,  
20      that were being gained for that large radio station.

21           Q       So they ceased streaming.

22           A       They ceased streaming on November 1st of

JA-0592

[ 8560 ]

1 last year.

2 Q What is Salem's present view as to the  
3 pros and cons of continuing to offer radio streaming?

4 A That depends on who you talk to. There  
5 are still some people who are caught up in the  
6 euphoria, but for the most part, as I said earlier,  
7 the jury is still out. Salem, as a company, doesn't  
8 have a position or a conclusion on whether or not  
9 streaming is beneficial enough to continue it in every  
10 case.

11 Like I say, there have been -- there is  
12 another station in Pittsburgh that's under my direct  
13 supervision that was streaming. It also ceased  
14 streaming this past year.

15 Q Now, Mr. Davis, are you familiar with the  
16 \$5,000 per station minimum fee that RIAA has proposed  
17 for this proceeding, during this proceeding?

18 A I have heard about that.

19 Q In your opinion, how would it affect the  
20 streaming of the stations represented by the NRBMLC?

21 MR. WINTERS: I'm going to object to that  
22 question. It's not referenced in his direct testimony

JA-0593

1 at all.

2 MR. JOSEPH: Allow me to take a quick  
3 look, because I thought that there was a discussion of  
4 the --

5 THE WITNESS: There was, indeed. Your  
6 Honor, I did this over the --

7 CHAIRMAN VAN LOON: Please check and  
8 direct our attention to wherever it is. I remember  
9 a --

10 ARBITRATOR VON KANN: There is some  
11 reference in paragraph 14 to the 250 minimum.

12 CHAIRMAN VAN LOON: Right. I remember  
13 that reference to --

14 ARBITRATOR GULIN: And there's a reference  
15 to minimum fee in 15 also.

16 MR. GARRETT: I think the point is there's  
17 no reference, obviously, to our proposed fee. I also  
18 think that to talk about it as the \$5,000 minimum is  
19 a mischaracterization of what it is that -- what we've  
20 proposed here. But in any event, it was clearly  
21 beyond the scope of his direct testimony.

22 MR. JOSEPH: Well, I --

JA-0594

1 CHAIRMAN VAN LOON: Overruled. Go ahead  
2 and continue to answer.

3 BY MR. JOSEPH:

4 Q And if you need me to repeat the question,  
5 I'm happy to do that.

6 A Well, I know I talked about the \$250 fee,  
7 which I felt and continue to feel was too much for  
8 these little stations that can't afford \$30 for a meal  
9 or \$100 for a hotel room. So the \$5,000, or whatever  
10 number you've quoted, is just beyond the scope of the  
11 thinking of most of these stations. I can't even  
12 imagine. I supervise some fairly large stations, and  
13 I turn down \$5,000 expenditures because of cost-  
14 benefit issues all the time.

15 Q And is there -- do you have an opinion as  
16 to how the -- a minimum fee in the range of \$5,000  
17 would relate to stations that use more limited amounts  
18 of music, in particular?

19 A Well, again, I -- keep in mind a lot of  
20 these stations buy a license from ASCAP/BMI, if I can  
21 use that analogy, only as a defensive measure. They  
22 may never play music. But they don't want to get in

1 trouble if they do or if one of their programmers do.

2 So they pay the fee and don't consider it  
3 -- you know, they have a special fee I guess. But it  
4 just isn't -- isn't something that seems to be fair,  
5 to have a high fee for such limited use.

6 ARBITRATOR VON KANN: Do you know what  
7 those fees typically run from ASCAP/BMI?

8 THE WITNESS: No, sir, I don't. You know,  
9 I should remember some of them, but I -- because there  
10 are so many markets involved, and so many different  
11 circumstances, I -- I couldn't add to that.

12 CHAIRMAN VAN LOON: Even a ballpark  
13 number, without having to be too specific?

14 THE WITNESS: I'm trying to think.

15 MR. JOSEPH: Excuse me. But I'd ask Judge  
16 von Kann to clarify whether he's referring to over-  
17 the-air fees or internet fees in this context.

18 ARBITRATOR VON KANN: Well, either. He  
19 just made reference to we -- we buy the license from  
20 ASCAP/BMI.

21 MR. JOSEPH: I think he was --

22 ARBITRATOR VON KANN: And I was just

1       curious as to what the cost of that purchase is.

2               MR. JOSEPH: I think he was referring to  
3       over-the-air in that context.

4               ARBITRATOR VON KANN: I'll take that, if  
5       he knows.

6               MR. JOSEPH: If you know.

7               THE WITNESS: Let me put it in context.

8               ARBITRATOR VON KANN: Okay.

9               THE WITNESS: I can tell you that after  
10       personnel and health care, it's the third largest  
11       expense of some of our stations.

12               ARBITRATOR VON KANN: Is it in your -- is  
13       it larger than \$5,000, or lower than \$5,000, or do you  
14       have any idea?

15               THE WITNESS: Per month?

16               ARBITRATOR VON KANN: Per year.

17               THE WITNESS: I think in New York it's  
18       larger than \$5,000 per month. Again, I can't attest  
19       to that. I would have to -- because it's an accrued  
20       amount that's paid once a year, I just -- I just can't  
21       remember.

22               ARBITRATOR VON KANN: Okay.

JA-0597

1 discuss the issues that arose in those negotiations.

2 And last, to go through more specifically  
3 the 26 agreements that we have.

4 Q Okay. Your testimony also discusses  
5 background music services?

6 A Yes, that's another.

7 Q And so you'll talk about that this morning  
8 as well?

9 A Yes, I will.

10 Q And can I count on you to explain the RIAA  
11 rate proposal in this proposal in this proceeding?

12 A Yes, I'll give it a shot.

13 Q Okay. All right. If you have your  
14 testimony in front of you, Mr. Marks, let me ask you  
15 to turn to 2 to 3 where you discuss the RIAA  
16 Negotiating Committee. Do you have that before you?

17 A Yes.

18 Q I think you already answered this in part,  
19 describing your background. But to tell us, when was  
20 the RIAA Negotiating Committee formed?

21 A It was formed shortly after the DMCA, the  
22 webcasting amendments became effective in late October

1 of '98. So, it would be the time frame of  
2 November/December of 1998.

3 Q Okay. And why was the committee formed?

4 A The committee was formed for the sole  
5 purpose of negotiating the statutory licenses under  
6 112 and 114.

7 Q Was it limited just to webcasting  
8 licenses?

9 A No. There are a number of different  
10 companies that are eligible for the statutory license.  
11 Cable and satellite services, such as DMX and  
12 MusicChoice, an arbitration back in '96 and '97 I  
13 guess covered those.

14 There are satellite digital radio services  
15 that are going to be launching in the near future that  
16 we hope to sit down and negotiate with.

17 And then there are new business models  
18 that I think none of us probably know about today that  
19 would fall under the statutory license provision.

20 So the committee that I formed was an  
21 offshoot of a group of people that had been more  
22 loosely together on some of the issues with the cable



1 and satellite services before, but not formally  
2 together as a negotiating committee.

3 Q Okay. And who actually formed the  
4 Negotiating Committee?

5 A It was formed by the RIAA. We generally  
6 operate with committees from our members. So, for  
7 example, there's a marketing committee, there's a  
8 committee for government relations, a committee for  
9 public relations, there's a committee for litigation.  
10 And each of the different roles that we play with  
11 regard to representing our members has a committee,  
12 and usually the person at the RIAA that's in charge of  
13 that department works with that committee.

14 Q Which entities were represented on the  
15 Negotiating Committee?

16 A EMI, Sony, BMG, Warner and Universal. We  
17 also asked the AFIM who represents independent record  
18 companies to suggest or propose somebody that could  
19 serve on the committee that represented the interests  
20 of independent record companies. So we had an  
21 individual by the name of Chad Darnell from a company  
22 called Etherean Music in Colorado.

1 that work with us, although they're not -- they don't  
2 deal with the committee itself.

3 Q Have you ever dealt with Mr. Sherman or  
4 Ms. Rosen at RIAA about webcasting issues?

5 A Yes. I report to both of them and keep --  
6 obviously keep them abreast of where we are in the  
7 negotiations and what other issues may be arising.

8 Q Okay. How are the negotiating positions  
9 and strategy formulated by the committee?

10 A They're formulated by the member  
11 companies. I mean they have from the beginning set  
12 the strategy and the objectives, and how we reach  
13 those objectives.

14 We sat down early on to figure out what  
15 our objectives were and how we wanted to reach them.  
16 And I've taken my direction from them.

17 Q Okay. So if you liked a particular deal  
18 or strategy and they didn't, what would happen?

19 A It would be rejected. There were a number  
20 of times where I would propose a certain type of  
21 license or a certain kind of term on a license, and it  
22 would either be rejected or changed, or we would go

1 back with a different position. But the ultimate  
2 decision has been theirs.

3 And, frankly, I've benefitted from, you  
4 know, their expertise in the areas. Because often  
5 times there are angles on issues that I may not have  
6 thought of that they're able to bring to my attention  
7 and we can discuss as a group and go from there.

8 Q I take it you've also made recommendations  
9 about particular strategies or different terms that  
10 they have, in fact, accepted.

11 A Yes, absolutely.

12 Q Okay.

13 ARBITRATOR VON KANN: Kind of get on this  
14 notion that the members control the strategy. Have  
15 there been instances in which -- let's see if I can --  
16 is this through a consensus through the discussions,  
17 have there been votes from time-to-time and a 5 to 4  
18 decisions coming down on the first Monday of October  
19 as to whether we take this deal or not? How do the  
20 members make those determinations?

21 THE WITNESS: Well, it's very much like  
22 that. We have -- just taking a hypothetical deal that

1 I've brought to them and suggesting to them we will  
2 have a very open and frank discussion about the deal  
3 terms, whatever open issues there are. And generally  
4 speaking we can reach consensus. But at the end of  
5 the discussion that subject, I poll every  
6 representative from every one of the companies. And  
7 we -- you know, our goal is to have everybody agree.  
8 So essentially if we had a three/two split, we would  
9 attempt to get the other two companies on board in  
10 some way so it wasn't a majority rules on every issue.  
11 It was -- but we did get -- vote and get everybody's  
12 feelings on it. And then if there was some  
13 disagreement, we try to come up with some compromise  
14 position so that we could get a consensus.

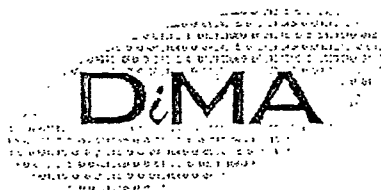
15 ARBITRATOR VON KANN: Okay.

16 BY MR. GARRETT:

17 Q Let me just ask you to turn to page 4 of  
18 your testimony for a minute. On page 4 and in note 2  
19 you provide some information about the nature of the  
20 webcasting industry.

21 A Yes.

22 Q I wonder if you could just briefly

RIAA Exhibit No. 150DP

## Deadlines for Webcasting License; Arbitration Information

### Upcoming Deadlines -- October 15 and November 1

As you may know, RIAA members and DiMA members held a series of meetings earlier this year to try to negotiate a webcasting license pursuant to the Digital Millenium Copyright Act of 1998. Those negotiations have stalled, and both sides are now preparing to press their case before an arbitration panel that will be convened by the U.S. Copyright Office.

First and foremost, you may rest assured that there is no need to be pressured into a license arrangement with the RIAA. The statutory license is intended to protect webcasters from being pressured into "voluntary" licenses with the RIAA (or its member companies) if users perceive that the RIAA-offered rates are not reasonable.

To our knowledge, most webcasters have not reached license agreements with the RIAA, because they intend to utilize the industry license that will be set through the upcoming arbitration.

DiMA urges every webcaster, regardless of whether you are a DiMA member or have a lawyer, to notify the Copyright Office that you plan to take advantage of the statutory webcasting license, and that you plan to participate in the arbitration. This is essential in order to reserve your right to do so in the future. The deadline for these filings is October 15 and November 1, so **please complete and file these today**. Click here for forms and filing instructions.

Although DiMA will not be a party to the arbitration, individual webcasters do intend to participate. DiMA members MTV Online and RealNetworks have joined together for purposes of this arbitration, and they are welcoming additional webcasters (large and small) onto their team. For more information about how you can participate on the MTV/RealNetworks team, send an email to their attorneys or telephone them at 212/310-8622.

For updated information, join DiMA, check the DiMA website regularly, or contact us at [info@digmedia.org](mailto:info@digmedia.org).

JA-0601.3

[Return to DiMA Home Page.](#)



SMarks@riaa.com on 06/01/2001 01:32:29 PM

To: music carp

cc:

Subject: FW: pho: Pho-Yahoo breaks from pack with record industry deal

---

----- Forwarded by Steve Marks/RIAA on 06/01/01 01:20 PM -----

"Potter, Jon"

<jpotter@columbusne  
wport.com>

Sent by:  
owner-pho@onehouse.  
com

09/07/00 09:30 AM

To: "'pho@onehouse.com'" <pho@onehouse.com>

cc:

Subject: FW: pho: Pho-Yahoo breaks from pack  
with record industry deal

With all due respect to Yahoo!, your suggestion that this agreement gives the company a "first mover advantage" is entirely, 100 percent, incorrect. ANY and EVERY website that would like to stream music pursuant to the DMCA statutory license rules (i.e., in a broadcast-like manner with only limited consumer/listener influence in the programming) can do so LEGALLY, LAWFULLY and without threat of infringement litigation, merely by submitting a single sheet of paper to the U.S. Copyright Office that essentially informs the world that when an industry-wide royalty rate is set, presumably through arbitration, the relevant website will pay the industry-wide rate. All websites are on a level playing field with regard to the legality of their streaming activity, once they submit the piece of paper.

As you may know, the significant majority of DiMA members have chosen file this paper and await the arbitrated industry-wide rate, and many are participating actively in the arbitration -- on a DiMA team led by MTVi, RealNetworks and AOL. This choice, to gain certainty by negotiating alone against the five major recording companies, or to join the industry leaders and arbitrate using with the best lawyers and economists in this very sophisticated arena, is a legitimate choice that all webcasters should consciously make. Yahoo, like Soundbreak and WWW.com, chose one path; the majority of webcasters have chosen to arbitrate.

Jon Potter  
Executive Director  
Digital Media Association  
www.digmedia.org

-----Original Message-----

From: Pao [mailto:gpao@earthlink.net]

Sent: Thursday, September 07, 2000 1:18 AM

To: Walter McDonough

Cc: pho@onehouse.com

Subject: Re: pho: Pho-Yahoo breaks from pack with record industry deal

Why do you think this was a dumb deal? I have no idea how much they are paying, but when rates are finally set, Yahoo can always renegotiate terms. What this gives Yahoo is a first mover advantage against AOL, Excite@Home, Lycos and others. The cost they are paying now is far less than the cost the other players have to pay (I'm not referring to payments to record companies) to catch up.

Besides, if they find out that the deal is bad for them, they can get out of it. Why? Because they're Yahoo.

Gene

Walter McDonough wrote:

>

> This has to be one of the dumbest deals of all time.

> How can Yahoo make a deal before the rates have been

> set. Someone should teach them what the words

> "leverage" and "value" mean in deal making. This will

> go down as a huge mistake and Yahoo obviously chose

> the wrong people to price the deal for them. They

> easily overpaid by a factor of no less than two.

>

>

> Do You Yahoo!?

> Yahoo! Mail -- Free email you can access from anywhere!

> <http://mail.yahoo.com/>

>

-----  
> This is the pho mailing list, managed by Majordomo 1.94.4.

>

> To send a message to the list, email pho@onehouse.com.

> To send a request to majordomo, email majordomo@onehouse.com and put your

> request in the body of the message (use request "help" for help).

> To unsubscribe from the list, email majordomo@onehouse.com and put

> "unsubscribe pho" in the body of the message.  
-----

-  
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SMarks@riaa.com on 06/01/2001 02:08:36 PM

To: music carp  
cc:

Subject: pho: RE: Is DiMA a Façade?

---

*MATERIAL REDACTED*

"Potter, Jon"  
<jpotter@columbusne  
<johnparres@yahoo.com>, wport.com>  
Sent by:  
owner-pho@onehouse.  
com

To: "'John Parres'"

pho@onehouse.com

cc:

Subject: pho: RE: Is DiMA a Façade?

02/10/00 09:07 AM

Actually my point was exactly the opposite. The strongest webcasters working together, hiring the best lawyers and economists available (who themselves have a tremendous record of success in rate litigation and arbitrations on behalf of broadcasters, cablecasters and other similar industries), are certain to attain a remarkably low rate in comparison to the rate attained by any single webcaster.

-----Original Message-----

From: John Parres [mailto:johnparres@yahoo.com]  
Sent: Thursday, February 10, 2000 3:47 AM  
To: pho@onehouse.com  
Subject: pho: Is DiMA a Façade?

--- "Potter, Jon" <jpotter@columbusnewport.com> wrote:  
> Could www.com have possibly gotten  
> a better rate than the  
> others working together will attain?  
>

John, I'm sorry, I don't understand this statement but would very much like to.

Are you suggesting that www.com has/will have done

better going it alone as opposed to what you will be able to achieve collectively under the DiMA umbrella through arbitration?

Or in other words, why in the world would the RIAA settle for a rate with a piss-ant site like www.com \*lower\* than that which they would reasonably expect to achieve through arbitration with the DiMA?

I am at a loss. Am I missing something?

The RIAA has a duty to do its best to fight for the maximum rate for its members, fair enough. I would assume the same for DiMA obo its members, but your words make it feel as if DiMA is acting out a strawman role on behalf of the RIAA.

Perhaps its just easier for you and Bob Kohn to sling arrows at Beam It (OK, all together now, 1 - 2 - 3 - "Kinkos!")

(OK, OK that was a cheap shot, but still it's true! The facts in that case are materially different.)

An Anonymous Pho'ster reminded me today of a News.com article from July 13, 1999. Perhaps it still applies?:

<http://news.cnet.com/news/0-1005-200-344712.html>

This is the relevant part:

DiMA's changing role

The heightened difficulty is evidenced by the diminished role of DiMA in recent negotiations. Over the past few months, individual Webcasters have begun negotiating directly with the RIAA, both groups confirmed. Six months ago, DiMA was the chief negotiator for Webcasters. DiMA was one of the parties that drafted the original amendment.

DiMA's Potter said the change was a natural progression in the negotiations, as larger issues got hashed out and gave way to the settling of items specific to individual members' businesses. Still, Potter, whose organization represents about 16 Webcasters, said the industry's rapid evolution has made DiMA's role more difficult.

"The changing industry is precisely what destabilizes the negotiations to some degree," he told CNET News.com. "It makes them harder."

According to observers who asked not to be named, the changes also mean that there is less unity among DiMA members, requiring them in many cases to negotiate separately with the RIAA to get a deal that best matches their unique business models. Potter, however, said DiMA members continue to rely on the group for

representation on a host of important issues and that the group is still signing up new members.

With the negotiation period about to expire, one or both of the parties is expected to file a petition with the U.S. Copyright Office asking that an arbitration panel set the fee. It is unlikely the panel would get the case before the beginning of 2000, and it would have six months to issue its recommendation, an attorney from the agency said. The Library of Congress then would have another four months to approve the recommendation.

oOo

---

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Talk to your friends online with Yahoo! Messenger.  
<http://im.yahoo.com>

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To send a request to majordomo, email [majordomo@onehouse.com](mailto:majordomo@onehouse.com) and put your request in the body of the message (use request "help" for help).

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1 benefit.

2 Q Why would you expect a different  
3 promotional benefit?

4 A Because millions of people listen to that  
5 station in the physical world when they're on their  
6 way home or when they're at home, and there's a much  
7 small percentage of people that are actually listening  
8 on line. So I wouldn't characterize the medium as  
9 having the same promotional weight than it does in the  
10 physical world.

11 Q I understand.

12 A Again, it's a very limited amount of  
13 content, it's a limited amount of buttons on your  
14 radio; it's confined to that one region. You can't,  
15 to me, factor in all these other elements and all of  
16 this other ability to reach people outside of that  
17 market, and yet say it's exactly the same thing. I  
18 won't agree that it's exactly the same thing.

19 Q Well, let's try it this way. Per capita  
20 per listener minute, the promotional benefit to Sony  
21 of someone listening to a radio signal over the air  
22 and someone in the same geographical area listening to

1 the same signal over their computer is going to be  
2 very similar, isn't it?

3 A There will be similarities. Yeah, I'll  
4 give you that.

5 Q Okay. Now, one of the sort of messages I  
6 take from your testimony is that both the music  
7 industry and the intersection of the music industry  
8 with the Internet are areas where things are changing  
9 dramatically; is that fair?

10 A Yes, that's correct.

11 Q And to a substantial extent,  
12 unpredictably; is that right?

13 A Yes.

14 Q For example, you believe the CDs are going  
15 away, but you don't know exactly when they're going  
16 away, do you?

17 A That's accurate, as in physical media; I  
18 wouldn't confine it to the compact disc. I would say  
19 physical media is going to I think decline over time  
20 and access from remote places -- unconnected  
21 access -- I think is going to increase. I think  
22 everybody thinks that in all media, not just the

1 CHAIRMAN VAN LOON: You mean an ad. You  
2 don't mean some sort of non-profit Save the Children  
3 or whatever.

4 THE WITNESS: Right. Yes, yes, yes,  
5 that's right. That's right. I meant it on an  
6 industry basis as opposed to it being necessarily for  
7 an individual company or for the public good  
8 necessarily.

9 CHAIRMAN VAN LOON: I see.

10 THE WITNESS: Although CDs I think are for  
11 the public good. That's another issue, I guess. And  
12 I guess it depends on what CD.

13 BY MR. KATZ:

14 Q Is the image of the record industry  
15 something which is sometimes a concern to the RIAA?

16 (Laughter.)

17 A You could say that. So there are probably  
18 a number of things that would be helpful for us to  
19 rectify what is often bad press or  
20 mischaracterizations of our positions and our goals.

21 The minimum fee, the point we wanted to  
22 make there, setting aside again the numbers, is that

1 we believe that the fee should be paid as an advance  
2 against future royalties at the time that the first  
3 monthly payment is due. This is something that we  
4 have begun to do in our individual agreements. We  
5 didn't do initially but we are doing now. And helps,  
6 for example, to offset some of the risk, for example,  
7 of companies going out of business. If you wait an  
8 entire year, they may be out of business and we don't  
9 get the appropriate fee. And, therefore, we believe  
10 it should be paid as an advance, and that is something  
11 that is not uncommon in the industry, generally, in  
12 license agreements.

13 ARBITRATOR VON KANN: What would your  
14 position be on separating those two functions? That  
15 is, on the one hand, there's a certain minimum fee  
16 that you ought to pay to help, I don't know, bear the  
17 cost of adding you to the licensing system; on the  
18 other hand, in this regime you make your royalty  
19 payments in advance, and at the end of the year if  
20 you've overpaid, we'll refund you the balance.

21 Now, there could be two different things.  
22 You could have a minimum administrative cost -- \$500,



Respectfully Submitted,

Patricia Palach /mju

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February 19, 2004

## CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served one copy of the foregoing Exhibits and Transcripts, this 19th day of February, 2004, by first class mail, to the following counsel of record:

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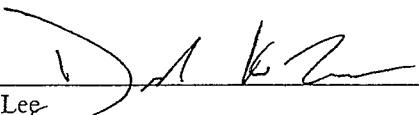
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\* Due to problems with U.S. mail delivery to government offices, the brief has been served by hand-delivery.